No. 80-841

FEB 11 19
ALEXANDER L. ST
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN F. HENSLER, JR., AND CHARLES BATTY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-841

JOHN F. HENSLER, JR., AND CHARLES BATTY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the warrantless search of petitioners' sailboat was proper.

2. Whether a search of petitioner Hensler's suitcase at an airport security checkpoint violated the Fourth Amendment.

3. Whether petitioner Batty waived his right to counsel prior to making a statement to law enforcement agents.

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 1

Statement 1

Argument 3

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Aguilar v. *Texas*, 378 U.S. 108 3

Brewer v. *Williams*, 430 U.S. 387 8

Jaben v. *United States*, 381 U.S. 214 3

Massiah v. *United States*, 377 U.S. 201 9

North Carolina v. *Butler*, 441 U.S. 369 8

Schneckloth v. *Bustamonte*, 412 U.S. 218 6

Scott v. *United States*, 436 U.S. 128 5

Spinelli v. *United States*, 393 U.S. 410 3

Terry v. *Ohio*, 392 U.S. 1 ..... 5, 7

United States v. *Burke*, 517 F. 2d 377 4

United States v. *Caraway*, 474 F. 2d 25, vacated as moot, 483 F. 2d 215 ..... 4, 5

United States v. *Chadwick*, 433 U.S. 1 4

United States v. *Darensbourg*, 520 F. 2d 985 4

United States v. *Davis*, 482 F. 2d 893 7

United States v. *DeAngelo*, 584 F. 2d 46, cert. denied, 440 U.S. 935 ..... 6, 7

PREVIOUS PAGE WAS BLANK

Page

Cases—Continued:

United States v. *Edwards*, 498 F. 2d 496 ..... 6, 7

United States v. *Henry*, No. 79-121 (June 16, 1980) 7

United States v. *Henry*, 615 F. 2d 1223 7

United States v. *Homburg*, 546 F. 2d 1350, cert. denied, 431 U.S. 940 7

United States v. *Martin*, 562 F. 2d 673 4

United States v. *Mohabir*, 624 F. 2d 1140 9

United States v. *Moreno*, 475 F. 2d 44, cert. denied, 414 U.S. 840 6-7

United States v. *Robinson*, 414 U.S. 218 5

United States v. *Rollins*, 522 F. 2d 160, cert. denied, 424 U.S. 918 4

United States v. *Skipwith*, 482 F. 2d 1272 6

United States v. *Spach*, 518 F. 2d 866 4

United States v. *Swihart*, 554 F. 2d 264 4

United States v. *Williams*, 516 F. 2d 11 6

Constitution and statute:

United States Constitution, Fourth Amendment 3, 5

21 U.S.C. 841(a)(1) 1

21 U.S.C. 952(a) 1

21 U.S.C. 963 1

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 625 F. 2d 1141.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1980. A petition for rehearing was denied on August 26, 1980 (Pet. App. 1b-2b). The Chief Justice extended the time for filing a petition for a writ of certiorari to November 24, 1980, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a bench trial in the United States District Court for the District of South Carolina, petitioners were convicted of conspiracy to import marijuana (21 U.S.C. 963), importation of marijuana (21 U.S.C. 952(a)), and possession of marijuana with intent to distribute it (21 U.S.C. 841(a)(1)). Petitioner Hensler was sentenced to concurrent terms of five years' imprisonment on the conspiracy and possession counts and a consecutive term of one year's imprisonment on the importation count, to be followed by a five-year special parole term. Petitioner Batty was sentenced to concurrent terms of four years' imprisonment on all counts, to be followed by a four-year special parole term. The court of appeals affirmed (Pet. App. 1a-10a).

The evidence at trial showed that petitioners, along with co-defendant Michael Falker,[1] attempted in August 1977 to smuggle more than 21,000 pounds of marijuana into this country from the Bahamas. Their scheme failed when their sailboat, which contained the marijuana, ran aground near Georgetown, South Carolina, and its cargo was discovered.

---

[1]Falker was indicted but has avoided arrest.

Petitioner Batty, an experienced sailor, was recruited to captain a sailboat full of marijuana from the Bahamas to Maine (2 Tr. 63-65, 67).[2] He was first given an airplane ticket to Ft. Lauderdale, Florida, where he met Falker and other conspirators. Batty and Falker then flew to the Bahamas to pick up the already-loaded sailboat (2 Tr. 66-69). They sailed north, but because they were low on food supplies, they put the boat in at Georgetown on August 25, 1977 (2 Tr. 70-71, 146). Two days later, petitioner Hensler arrived. The three men then rented a cottage located on deep water in Murrell's Inlet, were they intended to unload the marijuana into Hensler's van (2 Tr. 72, 145, 173; 3 Tr. 14-15). On August 29, Batty and Falker attempted to move the boat from a marina to Murrell's Inlet, but the boat ran aground on a sandbar (2 Tr. 72-73, 187-188). An attempt to dislodge the boat failed, despite assistance by a Coast Guard helicopter and a local rescue force (2 Tr. 73, 188-190). The boat was left aground, where it listed at a 45-degree angle (Pet. App. 8a; 1 Tr. 76-77).

On August 30, three men went out to the boat and discovered that it contained marijuana (1 Tr. 127; Pet. App. 4a). One of the three, Carson Benton, contacted Detective Johnson of the local police, showed him a small quantity of marijuana, and told him that the boat was "loaded down" with the substance (1 Tr. 47, 76-77; Pet. App. 4a-5a). Detective Johnson alerted the county sheriff, who ultimately directed that the boat be boarded and searched (1 Tr. 144-145; Pet. App. 5a). The marijuana was seized and unloaded by the police and Customs officers (1 Tr. 51-52, 81, 97-99) while petitioners watched from a secluded spot on shore (2 Tr. 73). Petitioners were later identified and arrested.

---

[2] "Tr." refers to the three volumes of hearings and trial, conducted jointly.

ARGUMENT

1. Petitioners contend (Pet. 14-48) that the search of the boat violated the Fourth Amendment because it was not supported either by probable cause to believe that contraband was aboard or by sufficient exigent circumstances to permit a search without a warrant. Both courts below, however, after careful review of the peculiar circumstances of this case, found against petitioners on these fact-bound claims. Further review is therefore unwarranted.

Petitioners argue (Pet. 19-20) that probable cause was absent because Detective Johnson apparently failed to ask Benton specifically whether his sample of marijuana came from the boat. However, as the overall context of their conversation plainly shows, the officer was justified in believing that the marijuana that Benton produced in fact came from the boat. Benton gave the officer a small sample; he then said that if it was marijuana, the boat was "loaded down" with a truckload of it (1 Tr. 47, 76-77). Viewed in a commonsense fashion, the clear inference to be drawn from Benton's statement was that he had obtained the marijuana from the boat.

Petitioners also assert (Pet. 17, 21-22) that probable cause was lacking because there was no basis for concluding that Benton was a reliable informant. But, unlike most narcotics informants whose credibility may often be suspect because of their own involvement in illegal activity, Benton was an ordinary citizen, with no motive to falsify, who came forward to report his discovery of evidence of a crime. The courts have recognized that the requirement that the police have specific information concerning the credibility of their informants (see *Aguilar* v. *Texas*, 378 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969)) should not be inflexibly applied in cases where the informant is a witness with no criminal background. See, *e.g.*, *Jaben* v. *United States*, 381 U.S. 214, 224 (1965); *United States* v. *Swihart*,

554 F. 2d 264, 268-269 (6th Cir. 1977); *United States* v. *Rollins*, 522 F. 2d 160, 164 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976); *United States* v. *Darensbourg*, 520 F. 2d 985, 988-989 (5th Cir. 1975); *United States* v. *Spach*, 518 F. 2d 866, 870 (7th Cir. 1975); *United States* v. *Burke*, 517 F. 2d 377, 380-381 (2d Cir. 1975) (Friendly, J.). Although Benton asked to be paid for his information, he nonetheless revealed it without receiving any remuneration; the mere fact that Benton requested compensation does not suggest that he was untrustworthy.

Petitioners' claim (Pet. 24-39) that both courts below erred in concluding that exigent circumstances justified the warrantless search is also not well taken. It is undisputed that the boat was tilted at a dangerous 45-degree angle, with no lines or anchor out (Pet. App. 8a). Moreover, in denying the motion to suppress, the district court took judicial notice of the fact that the boat and its contents could have been washed away by the tides (1 Tr. 192-193). As the court of appeals similarly observed (Pet. App. 8a; emphasis in original), "to all *appearances* she was quarry both to storm and stealth, to be carried out to sea or to the bottom, or towed to a more ready location for the discharge or dispensing of drugs." Under these circumstances, the need to act quickly was apparent and the warrantless search was therefore justified.[3]

---

[3]Petitioners' reliance (Pet. 31-32, 37-38) on cases such as *United States* v. *Martin*, 562 F. 2d 673 (D.C. Cir. 1977), and *United States* v. *Caraway*, 474 F. 2d 25 (5th Cir.), vacated as moot, 483 F. 2d 215 (5th Cir. 1973) (en banc), is misplaced. *Martin* involved the warrantless search of a suitcase in the absence of exigent circumstances. See *United States* v. *Chadwick*, 433 U.S. 1 (1977). In *Caraway*, the panel struck down a warrantless search of a houseboat, concluding that the Customs officers lacked probable cause and that the search was not authorized under 19 U.S.C. 1581(a), since the boat in question "was apparently inoperable, utilized as a stationary home, and clearly incapable of transporting cargo." 474 F. 2d at 32. Here, the courts below expressly

Petitioners appear to contend (Pet. 28, 32-33, 46) that in order to sustain the search under the Fourth Amendment the government was obligated to prove that the law enforcement officers had a subjective belief that the situation was exigent when they searched the boat without a warrant. There is no merit to this contention. In *Scott* v. *United States*, 436 U.S. 128, 135-138 (1978), this Court concluded that the determination whether or not the Fourth Amendment has been violated turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time. See *United States* v. *Robinson*, 414 U.S. 218, 236 (1973); *Terry* v. *Ohio*, 392 U.S. 1, 21-22 (1968). Viewed objectively, as both courts below concluded, exigent circumstances justified the warrantless search of the boat.

2. Petitioner Hensler contends (Pet. 48-55) that his Fourth Amendment rights were violated by a search of his carry-on luggage at the Pittsburgh airport approximately six weeks prior to the boat search. This claim is without merit.

The officer in charge of security at the Pittsburgh airport testified that when petitioner Hensler's bag was viewed through an x-ray machine, only a single large black spot was visible, thus requiring further investigation (2 Tr. 85). Petitioner was told that the bag would have to be searched before he could take it into the security area (2 Tr. 91). After

---

found that there was both probable cause and a realistic danger of destruction or removal of the boat. Petitioners cite the testimony of Customs officer Puig as evidence that the boat was not mobile at the time of the search (Pet. 26). But officer Puig testified that the boat was not mobile when he boarded it "[b]ecause the tide was down considerably" at that time (1 Tr. 108). The officer did not suggest that the boat would not have been mobile once the tides rose, nor did he indicate that the boat was not subject to damage as a result of rising tides.

the bag was opened, almost $100,000 in cash was revealed (2 Tr. 86-87). Petitioner testified that he was not given an opportunity to refuse permission to search the bag. He did admit, however, that he was familiar with security warning signs posted in airports, though he said he did not know their exact wording (2 Tr. 94-96).

Petitioner claims (Pet. 53-54) that the decision below upholding the security search is in error because it fails to require a showing of an individual's knowledge of his right to refuse to consent to such a search. However, as this Court observed in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227 (1973), knowledge of the right to refuse consent, while relevant to the question whether consent has been voluntary, is not "the *sine qua non* of an effective consent." The Court in *Schneckloth* concluded that the defendant had voluntarily consented to the search notwithstanding the absence of a showing that the defendant had actual knowledge of his right to refuse consent. Because of the "general knowledge that citizens boarding planes [are] subject to special scrutiny and to weapon searches" (*United States* v. *Skipwith*, 482 F. 2d 1272, 1274 (5th Cir. 1973)), and because petitioner here admitted that he was generally aware of signs posted in security areas of airports warning about the possibility of such searches, the district court correctly concluded (2 Tr. 97-101) that petitioner consented to the search by attempting to pass through the screening area and board the airplane. See *United States* v. *DeAngelo*, 584 F. 2d 46, 47-48 (4th Cir. 1978), cert. denied, 440 U.S. 935 (1979); *United States* v. *Williams*, 516 F. 2d 11 (2d Cir. 1975); *United States* v. *Edwards*, 498 F. 2d 496, 504-505 (2d Cir. 1974) (Oakes, J., concurring). Moreover, the result of the x-ray scan, which showed a large suspicious dark area, justified a protective search to determine whether the bag contained a pistol or other dangerous weapons. See *United States* v. *DeAngelo, supra*, 584 F. 2d at 47; *United States* v.

Moreno, 475 F. 2d 44 (5th Cir.), cert. denied, 414 U.S. 840 (1973); *United States* v. *Edwards, supra*, 498 F. 2d at 500-501.[4]

3. Finally, petitioner Batty argues (Pet. 56-63) that his confession was improperly admitted into evidence because his right to counsel was violated. This claim was properly rejected by the courts below.

Petitioner Batty was taken into custody on the instant charges on September 16, 1978, when DEA agents arrested him after his arraignment on a traffic offense in Gardner, Massachusetts. Petitioner testified that he was never advised of his *Miranda* rights and that he was assured that any statement he gave would be "off the record" (2 Tr. 39, 41-42). By contrast, DEA Agent Simkins denied any such promise and said that petitioner was advised of his rights, including his right to counsel, as soon as he was taken into custody, that petitioner acknowledged that he understood his rights, but that he nevertheless chose to give an oral

---

[4]Petitioner incorrectly asserts (Pet. 52-53) that the court of appeals' decision conflicts with the decisions of the Ninth Circuit in *United States* v. *Homburg*, 546 F. 2d 1350 (1976), cert. denied, 431 U.S. 940 (1977); *United States* v. *Davis*, 482 F. 2d 893 (1973); and *United States* v. *Henry*, 615 F. 2d 1223 (1980). *Homburg* approved a similar search on the rationale of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *Henry* found that the defendant had consented to the search at issue by expressing his desire to take his briefcase with him on the airplane. The continuing validity of *Davis*, insofar as it rejected the *Terry* rationale, has been called into question by the Ninth Circuit's subsequent decision in *Homburg*. Moreover, *Davis* involved a search that occurred before the FAA required airlines to post signs warning passengers that they and their luggage were subject to searches; the court in *Henry* noted that in the years following the decision in *Davis* "the public has become increasingly aware of the security measures used in airports" (615 F. 2d at 1228-1229), and left open the question whether submission to an x-ray scan constitutes consent to a subsequent physical inspection (*id.* at 1229 n.7, citing *United States* v. *DeAngelo, supra*).

statement to the agents while he was being transported to the DEA offices in Boston (2 Tr. 14-18, 20-22). The district court refused to credit petitioner's testimony and instead found that petitioner was "given ample warning of his rights" and that he understood them (2 Tr. 51). The court also found that the government had sustained its burden of proving that petitioner intentionally waived his rights to remain silent and to have counsel present, and that his statement was voluntary (2 Tr. 51, 59-62).

Petitioner does not claim—nor could he—that he asked to consult with counsel before making his statement.[5] Instead, the principal basis for his contention that he did not waive his right to counsel is the fact that some time after giving his oral statement to the agents he refused to sign a waiver of rights form. But, as this Court noted in *North Carolina* v. *Butler*, 441 U.S. 369, 375 n.5 (1979), the courts of appeals have uniformly rejected the argument that a refusal to sign a written waiver form precludes a finding of waiver. While evidence of a defendant's refusal to sign a waiver form may bear on the question whether the defendant knowingly and intelligently waived his right to counsel, such evidence is of little probative value where, as here, the defendant orally waived his right and gave a statement *prior* to his refusal to sign a waiver form (see 2 Tr. 32). There is ample evidence in this case to support the district court's fact-based conclusion, affirmed by the court of appeals, that petitioner knowingly and intelligently waived his right to counsel.

Petitioner's reliance (Pet. 59-61) on *Brewer* v. *Williams*, 430 U.S. 387 (1977), is misplaced. In that case, despite an agreement between the police and defense counsel that

---

[5]Agent Simkins testified that he asked petitioner whether he wanted to call his wife or attorney, but petitioner declined, saying there was no need to do so because his attorney had already been contacted (2 Tr. 18-19).

Williams would not be questioned and despite Williams' express and implicit assertions of his right to counsel, a police officer purposefully isolated Williams from his attorneys and elicited incriminating statements from him through skillful interrogation. The police officer did not remind Williams of his right to have a lawyer present and made no effort to ascertain whether Williams wished to relinquish that right. In those circumstances, the Court held that there was no reasonable basis for finding that Williams waived his right to counsel. However, the Court made it clear that its decision did not mean that an accused could never, without notice to counsel, waive his right to counsel after formal charges have been brought; it held only that Williams had not done so on the facts of that case. 430 U.S. at 405-406. Nor is this case like *Massiah* v. *United States*, 377 U.S. 201 (1964), which involved the use at trial of a defendant's post-indictment statements to a co-defendant who was acting as an undercover informant for the government. In such a setting, as this Court recently reiterated in *United States* v. *Henry*, No. 79-121 (June 16, 1980), slip op. 9, the defendant, unaware that he is speaking to "a government agent expressly commissioned to secure evidence, cannot be held to have waived his right to the assistance of counsel." Here, however, unlike in *Brewer* or *Massiah*, petitioner understood his rights and chose to waive them.[6]

---

[6]Petitioner does not contend that he was unaware of the fact that he had been indicted, or of the implications of that fact, when he gave his statement to Agent Simkins; indeed, the record strongly suggests that petitioner was fully cognizant of the situation, since an attorney had already been retained to represent him on the instant charges (2 Tr. 18-19). Accordingly, this case is not an appropriate one in which to resolve the question whether an indicted defendant who has been advised of his *Miranda* rights must additionally be informed that he has been indicted and advised of the significance of an indictment in order to make a knowing and intelligent waiver of his right to counsel during a pre-arraignment interrogation. See *United States* v. *Mohabir*, 624 F. 2d 1140, 1145-1151 (2d Cir. 1980).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN C. KEENEY
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

FEBRUARY 1981

DOJ-1981-02